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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

17 Cr. 686 (LAK)

5 JAMES GATTO, a/k/a "Jim,"
6 MERL CODE,
7 CHRISTIAN DAWKINS,

Defendants.

8 -----x

9 October 1, 2018
10 9:47a.m.

Before:

11 HON. LEWIS A. KAPLAN,

12 District Judge
13 and a Jury

14 APPEARANCES

15 ROBERT S. KHUZAMI
Acting United States Attorney for the
16 Southern District of New York
BY: EDWARD B. DISKANT
17 NOAH D. SOLOWIEJCZYK
ALINE R. FLODR
18 ELI J. MARK
Assistant United States Attorneys

19 WILLKIE FARR & GALLAGHER LLP
20 Attorneys for Defendant Gatto
BY: MICHAEL S. SCHACHTER
21 CASEY E. DONNELLY

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APPEARANCES (Cont'd)

NEXSEN PRUET LLC

Attorneys for Defendant Code

BY: MARK C. MOORE

-and-

MERL F. CODE

HANEY LAW GROUP PLLC

Attorneys for Defendant Dawkins

BY: STEVEN A. HANEY

Also present: SONYA JACOBS, Paralegal
SYLVIA LEE, Paralegal
ANTHONY CASOLA, FBI

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(Case called; all sides ready)

THE COURT: Let me have, at the outset, the latest projections of trial duration, because I have to say something to the jury and it may as well be accurate.

MR. DISKANT: Your Honor, assuming that the Court continues to sit on the schedule that we were advised, the government firmly projects that its case in chief will last approximately three weeks. We do expect a defense case here, although I'll obviously allow defense counsel to address that. So, we continue to believe that approximately a month remains a sound estimate of the trial length.

THE COURT: All right. Let me hear from the defense.

MR. SCHACHTER: We agree with that estimate, your Honor.

THE COURT: You agree that the government's case will

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1 be about three weeks?

2 MR. SCHACHTER: And the government estimated a defense
3 case of approximately one week and I think that is accurate.

4 THE COURT: All right. Anyone else?

5 MR. HANEY: Your Honor, we agree as well on behalf of
6 Mr. Dawkins.

7 MR. MOORE: As do we for Mr. Code.

8 THE COURT: OK. The second thing I wanted to address
9 is there was an application last week by ESPN for permission to
10 hook up to Courtroom Connect for the purpose of obtaining
11 realtime feed of the court reporter's draft transcript. The
12 District Executive's office has denied it on the ground that it
13 would -- well, I won't even go into why. I have the authority
14 to make an exception. I declined to do so. If it becomes
15 appropriate, I will explain in more detail later, but it is
16 denied.

17 I am reminded we need to arraign the defendants on the
18 Superseding Indictment Number 2.

19 Andy, would you do the honors?

20 THE CLERK: Have the defendants received a copy of the
21 S2 Superseder? Has the get Gatto, Mr. Schachter?

22 MR. SCHACHTER: Yes, and we waive the public reading.

23 THE CLERK: As to Defendant Code, Mr. Moore?

24 MR. MOORE: Yes, we have, and we also waive the public
25 reading.

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1 THE CLERK: As to Defendant Dawkins?

2 MR. HANEY: Yes, we have, and we waive the public
3 reading.

4 THE CLERK: Have you reviewed it with your client, Mr.
5 Schachter?

6 MR. SCHACHTER: Yes.

7 THE CLERK: Mr. Moore?

8 MR. MOORE: Yes, we have.

9 THE CLERK: Mr. Haney?

10 MR. HANEY: Yes, we have.

11 THE CLERK: And how does your client plead? Mr.
12 Schachter?

13 MR. SCHACHTER: Not guilty.

14 THE CLERK: Mr. Moore?

15 MR. MOORE: Not guilty, your Honor.

16 THE CLERK: Mr. Haney?

17 MR. HANEY: Not guilty.

18 THE COURT: OK. Now, let me just say this to each of
19 the defendants. I'll probably raise it again later on but I'm
20 going to do it now anyway.

21 I advise each of you that the question of whether you
22 testify in your own defense in this case is something entirely
23 committed to your own personal decision. You have the right to
24 the advice of your counsel concerning whether in your counsel's
25 view it is advisable for you to testify, but it is not up to

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1 your lawyer. That's not a call your lawyer gets to make. It
2 is a call only you get to make.

3 If we get to a point in the trial where the government
4 has rested and the time has come to present the defense case,
5 if your lawyer rests or in the case that your lawyer will put
6 on either no evidence at all or no further evidence beyond what
7 you will have heard by then and it is your wish to testify, you
8 have that right. And what you are to do at that point if you
9 wish to testify is simply to stand up. Don't say anything.
10 Wait for me to recognize you. I will excuse the jury. I will
11 see whether the reason you are standing is because you want to
12 testify, and if that's the case, you will be permitted to
13 testify.

14 If you don't stand up at that point, or if I don't
15 raise the question again with you correctly, you will have
16 waived your right to testify in this case.

17 Do you understand that, Mr. Gatto?

18 DEFENDANT GATTO: Yes, your Honor.

19 THE COURT: Do you have any questions about that?

20 DEFENDANT GATTO: No, sir.

21 THE COURT: Mr. Code?

22 DEFENDANT CODE: Yes, your Honor.

23 THE COURT: And Mr. Dawkins?

24 DEFENDANT DAWKINS: Yes, your Honor.

25 THE COURT: All right. Thank you.

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1 Now, we have these massive papers on the motions in
2 limine. The government has moved for four kinds of relief.
3 I'll take them in reverse order.

4 What is described in the papers as the fourth branch
5 of the government's motion, which seeks an order precluding
6 certain testimony or examination regarding FBI agents, is
7 granted. That inquiry is precluded.

8 Second, I have the motion with respect to the
9 defendants' proposed expert under consideration.

10 Is anybody intending to put in any more paper on that?

11 MR. DISKANT: Not from the government, your Honor.

12 MS. DONNELLY: The defense is not putting in any more
13 paper.

14 THE COURT: OK. So that is sub judice, and I will
15 make up my mind how I want to handle it.

16 Now, the other two branches of the government's
17 motions seek to preclude evidence, cross-examination, or
18 reference to past unrelated major NCAA rules violations
19 involving what I will refer to, because the parties have done
20 so, as the victim universities, Louisville, Miami, Kansas and
21 N.C. State, and also other institutions. It seeks also to
22 require the defendants to specifically identify in advance each
23 past minor NCAA rule violation that it intends to question
24 anybody about or with respect to which they intend to offer any
25 evidence.

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1 In a letter of Friday, the government has scaled back
2 the scope of its request. To the extent I understand the
3 government's present position, it is not seeking to preclude
4 cross-examination of its cooperating witnesses regarding NCAA
5 rule violations in which those witnesses themselves were
6 involved.

7 Am I right about that so far, Mr. Diskant?

8 MR. DISKANT: Yes, your Honor.

9 THE COURT: All right. Thank you.

10 What I understand it now to be seeking to preclude are
11 two things, and I'm quoting their letter: "Litigation and
12 relitigation of fact and events of no relevance to this case
13 and broad unsubstantiated claims like Division I schools across
14 the country regularly engaged in NCAA rule violations."

15 Do I have that right, Mr. Diskant?

16 MR. DISKANT: Yes, your Honor.

17 I would just note with respect to the second that
18 that's where, you know, myriad minor violations that we have no
19 notice of might come up.

20 THE COURT: Am I right in concluding that principally
21 what this motion is aimed at is preclusion of any discussion of
22 the events relating to the NCAA's University of Louisville
23 Public Infractions Decision of June 2017; is that what this is
24 really focused on?

25 MR. DISKANT: I think, given the way all parties think

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1 the evidence is coming out at this trial, your Honor is
2 correct, that is the prior violation that is most likely to
3 come and it is most troubling to the government.

4 THE COURT: Mr. Schachter, is anything else of this
5 nature going to come up other than the Louisville matter?

6 MR. SCHACHTER: Your Honor, it depends on what the
7 definition is of the word "NCAA rule violation." If --

8 THE COURT: Well, let's divide it into two pieces
9 right away. "Major violations" are a term of art, and let's
10 talk about major violations first.

11 MR. SCHACHTER: If there are violations found by the
12 NCAA, then I think that is going to be principally Louisville
13 as well as the Miami violation, which we mentioned. And then,
14 as addressed in our motion in limine or the response to the
15 motion in limine with respect to Dr. Rascher's testimony, there
16 will be testimony regarding NCAA rule violations and how they
17 were dealt with by the NCAA and what the effect was on
18 universities, and that's addressed in that motion.

19 THE COURT: But that's only expert testimony?

20 MR. SCHACHTER: Correct.

21 May I confer?

22 THE COURT: Insofar as we are talking about alleged --
23 yes, maybe not even alleged, but certainly alleged, at least --
24 major rule violations, we're talking only about the, for want
25 of a better term, adjudicated -- I put that in quotes -- major

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1 violations involving Louisville and Miami, and those are the
2 two recent ones, Louisville in 2017 and Miami in 2013; is that
3 correct?

4 MR. SCHACHTER: That is correct.

5 THE COURT: And nothing else?

6 MR. SCHACHTER: In the world of adjudicated NCAA rule
7 violations.

8 THE COURT: What about other major violations?

9 MR. SCHACHTER: Well, I do anticipate -- we were
10 confused a little bit as to what the government's motion was
11 directed to --

12 THE COURT: You are not alone.

13 MR. SCHACHTER: -- there certainly will be evidence
14 that informs the defendants' intent of their knowledge of other
15 conduct which violates NCAA rules.

16 THE COURT: So you are proposing to offer evidence of
17 defendants' state of mind based on their knowledge -- their
18 personal knowledge -- at relevant times of other alleged but
19 not adjudicated major violations, is that accurate?

20 MR. SCHACHTER: That is accurate. In addition to --
21 in addition to -- I mean, I would also say that evidence of
22 which there may not be evidence of defendant -- so there
23 certainly is evidence that goes to their state of mind of which
24 the defendant have personal knowledge of, and that is captured
25 in the wiretap recordings. Then there is evidence of which

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1 defendants may not -- there may not be proof of them having
2 personal knowledge but the government has taken the position
3 that they are going to prove the defendants' fraudulent intent
4 based on their experience and sophistication in the college
5 basketball world. And to the extent that that is going to be
6 the government's evidence, then the defense also believes that
7 it should be able to show what someone with sophistication and
8 experience in the college basketball world would know. So I
9 put those in two buckets, your Honor.

10 THE COURT: Well, one seems considerably more
11 problematic than the other.

12 All right. It seems to me -- now, what about the
13 minor violations?

14 MR. SCHACHTER: The minor violations, that is also a
15 subject that I believe is really going to, for the most part,
16 come up in Dr. Rascher's testimony. To some extent, I do
17 anticipate some cross-examination of the university witnesses
18 in that regard. Part of the government's case here is that
19 certifications -- the gravamen of this wire fraud case are
20 false certifications that were submitted. Those certifications
21 say, in broad strokes, we certify that we are aware of no NCAA
22 rule violation. However, it is the defense's position that
23 those certifications are not material. They cover all NCAA
24 rule violations. The universities are not relying on these
25 certifications for anything --

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1 THE COURT: So your view, I take it then, would be
2 that there is no material difference between a tax return
3 signed by a taxpayer in which the taxpayer omits \$20 million
4 worth of income and a tax return submitted by a taxpayer and
5 signed by him in which the understatement of income is \$12.

6 MR. SCHACHTER: I agree with your Honor, of course,
7 that there is a significant difference between those
8 circumstances. My point is, rather, that when the universities
9 go through the motions of having student athletes sign
10 certifications, that they actually put no stock in them because
11 they understand, which should be our argument -- may be our
12 argument to the jury, that these are not important documents to
13 the university because the universities know that these
14 certifications get violated all the time. They are not paying
15 any attention; they put no stock in these certifications. We
16 think that that is a relevant argument that we should be able
17 to make to the jury on the subject of materiality.

18 THE COURT: All right. I think in light of the
19 conversation here, the government and the defense ought to
20 discuss this point further as to what's really at issue. And I
21 think in light of the change in the government's position as of
22 Friday, and the elaboration this morning by the defense,
23 coupled with whatever further elaboration you can arrive upon,
24 I think we ought to start again with these papers, because the
25 papers that I got in the first place are not focused on what's

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1 really at issue and it even wasn't clear to me what really was
2 in issue, and you need to do that quickly.

3 In the meantime, until I have new submissions and have
4 ruled, there will be no reference, either in arguments before
5 the jury or in testimony or other exhibits, to any NCAA rule
6 violations involving either the victim universities, or others,
7 save that the defendants of course are free to cross-examine
8 cooperating witnesses regarding any NCAA rules violations in
9 which the witness under examination was involved, and then
10 we'll sort out the rest of this as quickly as we reasonably
11 can.

12 And that takes care of that piece.

13 So I think that handles, as well as I can, the in
14 limine motions for the moment.

15 Mr. Schachter.

16 MR. SCHACHTER: Your Honor, I just want to make sure
17 that I understand.

18 The Court's ruling relates to things like the
19 Louisville adjudicated NCAA resolution? I ask that because the
20 Indictment itself speaks of other NCAA rule violations. For
21 example, the Indictment references the fact that when the
22 request is made to provide payment to the family of the player
23 at Louisville, that it is because another university has made
24 another offer. Similarly, there is an allegation with respect
25 to Miami, that there is a need -- the request comes in to match

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1 a similar offer which has been made of \$150,000 by the
2 University of Arizona Nike School that's in the Indictment. I
3 assume that your Honor's restrictions on us focus on other
4 adjudicated NCAA rule violations that aren't part of the
5 gravamen of the charges? I just want to make sure I understand
6 what --

7 THE COURT: Mr. Diskant.

8 MR. DISKANT: We have no objection to the particular
9 facts that Mr. Schachter referred to.

10 THE COURT: OK. That takes care of that.

11 MR. HANEY: On behalf of Mr. Dawkins, the government's
12 evidence includes, against my client at least, evidence of
13 other NCAA violations. So, they are attempting to use evidence
14 of NCAA violations that my client is alleged to have committed
15 that involve universities that are not a subject of this case.
16 It seems as if they are trying to use the same evidence that
17 now they want to be precluded from referencing on
18 cross-examination most notably of their witnesses, even the
19 noncooperators, your Honor. They have a witness from the
20 University of Louisville Compliance Department who is going to
21 testify, and we should have the right to cross-examine that
22 witness as to the witness' credibility because a lot of the
23 violations that occurred occurred on the watch of that
24 particular compliance director, and we feel we should have the
25 right to cross-examine that witness as to why that witness took

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1 no action back when those violations occurred.

2 THE COURT: Mr. Diskant.

3 MR. DISKANT: Perhaps, as the Court suggested, we
4 should confer with defense counsel on that issue, which I am
5 happy to do.

6 I will say with respect to Mr. Dawkins' engagement in
7 other rules violations, the government has generally agreed not
8 to go there at the defendant's request. I think the only other
9 significant conduct that is going to be coming in is conduct
10 the defendant engaged in with a government cooperator because
11 the defendants wanted to be able to cross-examine the
12 cooperator about that conduct. If they don't want to cross
13 about that, you know, we can potentially agree to leave it out
14 of the case entirely.

15 THE COURT: I think you should talk to each other.

16 Look, you know, the plain fact of it is that the
17 defense put in on this motion -- and it was recent -- over 500
18 pages of material. I have had essentially -- well, not
19 "essentially." I have had grossly inadequate time to consider
20 it. This is an interim ruling to give me enough time to
21 understand exactly what is at issue and to rule on it, and
22 that's that.

23 OK. Just to review briefly the calendar for next
24 week: Monday is a dark day because it is a holiday. My
25 present plan is to sit about a half a day Tuesday. I have to

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1 be at a Judicial Conference committee meeting out of New York
2 by Tuesday night, and in order to catch a plane, I am just not
3 able to sit more than half a day. I will be out Wednesday and
4 coming back bleary-eyed on Thursday. We will sit on Thursday
5 and not Friday, as currently planned. That could conceivably
6 change but it is not very likely.

7 OK. Anything else we need to take up?

8 MR. DISKANT: Your Honor, we just wanted to put on the
9 record the status of plea negotiations, or lack thereof --

10 THE COURT: Yes. Thank you.

11 MR. DISKANT: -- of particular plea offers.

12 A formal written plea offer was extended to Defendant
13 Christian Dawkins. Our understanding is that the terms of that
14 offer were conveyed by his counsel to him and that the offer
15 was rejected.

16 With respect to the other two defendants, there were
17 some informal plea talks but nothing that resulted in any sort
18 of a formal plea offer being extended.

19 THE COURT: Mr. Dawkins, is that accurate?

20 MR. HANEY: That would be correct, your Honor.

21 THE COURT: I want to hear it from Mr. Dawkins.

22 DEFENDANT DAWKINS: Yes.

23 THE COURT: And that offer was in writing are, is that
24 correct?

25 DEFENDANT DAWKINS: Yes.

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1 MR. DISKANT: Yes.

2 THE COURT: Mr. Dawkins, and you've seen the writing?

3 DEFENDANT DAWKINS: Yes, sir.

4 THE COURT: OK. And is that accurate, Mr. Code?

5 DEFENDANT CODE: Yes, your Honor.

6 THE COURT: And Mr. Gatto?

7 DEFENDANT GATTO: Yes, your Honor.

8 THE COURT: OK. Anything else before we start with
9 the jurors?

10 MR. DISKANT: Not from the government.

11 THE COURT: OK. We will recess briefly because the
12 jurors are apparently down getting juror orientation but it
13 shouldn't be too much longer.

14 (Recess)

15 (Jury selection followed)

16 (Adjourned to October 2, 2018, at 9:30 a.m.)

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